

Remarks

Claims 27–46 remain in the application. This transmittal is presented in response to the official office action and is believed to completely resolve each issue as raised by the examiner. Applicant believes the claims to be enabled, novel, non-obvious, patentably distinct from all prior art, and to satisfy the written description requirement.

Office Action Finality Indeterminate:

Applicants respectfully point out that in the “Office Action Summary” both boxes 2a (corresponding to “This action is **FINAL**”), and 2b (corresponding to “This action is non-final”) were marked (see Office Action Summary, boxes 2a and 2b or alternatively Appendix A of this response). Accordingly, applicants respectfully urge that the official office action is self-contradictory and is indeterminate in its finality. Consequently, applicants respectfully request that the examiner withdraw the office action and replace the office action with a new office action determinable in its finality.

Office Action Finality Improper:

Applicants respectfully point out that in the office action “Conclusion”, the examiner states, “All claims are drawn to the same invention claimed in the earlier application and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the earlier application. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action in this case”. Applicants respectfully disagree with the examiner and respectfully request that the finality of the office action (if indeed the action is final), be withdrawn.

Applicants respectfully point that applicants deleted all previous claims and added new claims that among other things, in contrast to applicant’s previous claims, comport to the ruling of *In Re Klein* and thus will be shown to be nonobvious. Because applicant’s claims are different than any previous claims and because applicant’s claims include a new reason for nonobviousness, applicants respectfully urge that the finality of the office action (if indeed the action is final), was improper.

OA Item #1: Claims rejection under 35 USC § 103(a) – Obviousness:

The examiner has rejected claims 27-46 under 35 USC § 103(a) as being unpatentable over Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A, B, D, F and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870) and Applicants' admission of the prior art, **in view of Price (3,840,678)**, as further evidenced by Hunter (GB '356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR '917), Pilot Ink (JP '388), and McCaffery ('164) **and further in view of Vogelsang (4,522,523) and Manzone (6,159,492)** (collectively the cited art) (see office action pg 2, 3rd para.). Applicants respectfully traverse the examiner's rejection.

In the first instance, applicants respectfully point out that the instant application claims priority back to Schramm patent 5,246,046 having a filing date of January 30, 1992, and incorporates the same by reference. Accordingly, applicants urge that those references of the "cited art" that postdate January 30, 1992 are not citable as prior art. This is most especially true of cited reference "Schramm ('046)". Thus because the rejection is improper due to citing art that is not prior art, applicants respectfully request that the examiner withdraw the obviousness rejection and allow the instant application.

In the second instance, applicant respectfully submits that all of the "cited art" is nonanalogous art. Applicant respectfully points out that all of applicant's claims are, *"for use in coating a lollipop with a candy powder while preventing spillage of said candy powder"* (see the preamble in each independent claim of the instant application) and as such define a field of endeavor and problem to be solved that is substantially different than all of the "cited art". In substantiation of applicant's urging of nonanalogousness, applicants point to In Re Klein (see In re Klein, No. 10-1411, 2011 WL 2178134 (Fed. Cir. June 6, 2011)). Klein invented *"A convenience nectar mixing device for use in preparation of sugar-water nectar for feeding hummingbirds, orioles or butterflies"* which comprised a mixing container having a movable divider. The three references cited against Klein, namely, Roberts, O'Connor and Kirkman, were directed toward containers with movable dividers used to separate solid items. The CAFC reversed the BPAI in declaring Roberts, O'Connor and Kirkman to be nonanalogous art. Applicant posits that it was expressly Klein's specific statement of intended use –

“preparation of sugar-water nectar for feeding hummingbirds, orioles or butterflies” – that caused the CAFC to reverse the BPAI. Likewise, applicants urge that applicant’s statements of intended use have defined applicant’s field of endeavor and problem to be solved and have clearly established the “cited art” to be nonanalogous. Accordingly, applicants respectfully request that the examiner withdraw the obviousness rejection and allow the instant application.

OA Item #2: Claims rejection under 35 USC § 103(a) – Obviousness:

The examiner has rejected claims 27-46 under 35 USC § 103(a) as being unpatentable over **Price (3,840,678)**, as further evidenced by Hunter (GB ‘356), Williams (‘174), Ciffo (2,917,766), Schramm (‘046), Martindale (‘797), Kennedy (‘390), Beutlich et al (GB ‘581), McCombs (‘714), Meth (‘599), Patterson (‘975), Corteggiani et al (FR ‘917), Pilot Ink (JP ‘388), and McCaffery (‘164), **in view of Product Alert (3/23/98)**, as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A, B, D, F and G, Baker (WO 00/19803), Coleman (‘884), Hoeting et al (‘870) and Applicants’ admission of the prior art, **and further in view of Vogelsang (4,522,523) and Manzone (6,159,492)** (collectively the cited art) (see office action pg 3, 2nd para.). Applicants respectfully traverse the examiner’s rejection.

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Conclusion:

Applicant notes that any amendments made by this paper which are not specifically discussed herein are made solely for the purpose of more clearly and particularly pointing out and claiming applicants' invention.

Applicant specifically reserves the right to prosecute claims of broader and differing scope than those presented herein in a continuation application.

Applicant submits that the arguments presented herein have established the claims to be in condition for allowance. Action in accordance therewith is earnestly solicited.

If the examiner has any questions or comments which may be resolved over the telephone, the examiner is requested to call Michael R. Schramm at 801-710-7793.

DATE: July 2, 2012

Respectfully submitted,



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